IN THE SUPREME COURT OF THE STATE OF KANSAS.

No.....

ARTHUR S. HUMES, Relator,

vs.

ROBERT HUDSPETH, CECIL SHUTTLEWORTH, ARTHUR HOFFMAN, Respondents.

Appeal from the District Court of Leavenworth County, Kansas, Honorable Judge Wendorff, Presiding.

BRIEF OF RELATOR.

"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of the said service, and for reasons given in writing, and the persons whose removal is sought shall have notice of the same and of any charges preferred against him. * * * "

—Title 5, Sec. 652, U. S. Code.

"Res Judicata (Lat. the matter has been adjudged). A legal or equitable issue which has been decided by a court of competent jurisdiction."

—Bouveir Law Dictionary.

"To judge from the accuracy of the proper extent of the federal judicature, it will be necessary to consider in the first place what are its proper objects.

"It seems scarce to admit of controversy that the judiciary authority of the union ought to extend to these several descriptions of cases: 1st. To all of those that arise out of the laws of the United States, passed in pursuance of their just and constitutional

powers of legislation; 2nd, To all those which concern the execution of the provisions expressly contained in the Articles of Union; 3rd, To all those in which the United States are a party; 4th, To all those which involve the peace of the confederacy, whether they relate to the intercourse between the states themselves: 5th, To all those which originate on the high seas and are of admiralty, or maritime jurisdiction; and lastly to those in which the state tribunals cannot be supposed to be impartial and unbiased."

—Hamilton, The Federalist, No. LXXX.

"Obligation to guard and enforce every right secured by the Federal Constitution rests on the state courts equally with the federal courts."

—Mooney v. Holohan, 79 L. ed. 103.

"State courts have concurrent jurisdiction to enforce seaman's rights of action established by the Merchant Marine Act."

—Engel v. Davenport, 70 L. ed. 813.

"Though federal courts have original jurisdiction of suits by the United States at law or in equity, such jurisdiction is not exclusive."

—80 L. ed. 393.

"Generally, state courts have concurrent jurisdiction with federal courts of actions arising under federal statutes."

—Thomas v. Chicago, B. & Q. Railroad Co., 127 Kan. 326, 273 Pac. 451, 64 A. L. R. 322.

"State courts must hold themselves open for prosecution of civil right growing out of the United States laws."

—Miller v. Reading Co., 140 A. 618, 292, 44.

"State court has concurrent jurisdiction with fed-

eral courts to pass on federal question."

—Caruthers v. Hines, 275 U. S. 525, 72 L. ed. 406.

State district courts are of general jurisdiction, competent to try actions under Federal Employers' Liability Act."

—Witort v. C. & N. W. R. R. Co., 178 Minn. 261.

"State courts have jurisdiction over officers of the United States courts such as marshals, referees. and trustees in bankruptcy to require damages for wrongful acts entirely beyond the legitimate scope of their official duties."

—Smith v. Beaman, 68 S. E. 1014, 8 Ga. App. 262.

"A suit by a riparian owner to prevent interference with his rights in a submerged water front by an officer of the United States in possession of a pier built by the United States is not a suit against the United States."

—Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126.

"The military reservation of Fort Leavenworth was not, as already said, acquired by purchase with the consent of Kansas. And her cession of jurisdiction is not of exclusive legislative authority over the land, except so far as that may be necessary for a military post."

—Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 542. 29 L ed. 270.

"That the exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation in said State, as declared from time to time by the President of the United States, saving, however,

to the said State the right to serve civil or criminal process within said reservation, in suits or prosecutions for or on account of rights, acquired, obligations incurred, or crimes committed in said State, but outside of said cession and reservation; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchise and property, on said reservation."

—Laws of Kansas of 1875, p. 95.

ARGUMENT.

The relator took the Civil Service examination, passed and some months later was appointed a junior custodial officer at Leavenworth, Kansas. About five weeks after the relator entered on his duties, without cause the relator was dismissed. Several months later the relator filed suit in the Leavenworth County District Court against these respondents and service was had on them on the United States Reservation adjoining Leavenworth, Kansas.

The respondents specially appeared and asked the court to quash the service, because service was not had in Kansas, but upon the United States Reservation. Along with other reasons to quash, the Honorable Summerfield S. Alexander and the Honorable Homer Davis specially appearing as attorneys for the respondents in their official capacities as United States District Attorneys. Relator objected to their appearing in their official capacities as the United States was not a party to the suit. Whether the court received them in their official capacities or as attorneys of his court is not disclosed, but the court heard their prayer, and refused to take jurisdiction. The relator

having waited too long for appeal, filed an amended petition with little change from the original petition, with request to the sheriff to summon the respondents in Leavenworth if possible, but the last day of the service of process having arrived, and his inability to serve them in Leavenworth, the service was again had on them on the United States Reservation where the respondents reside a few feet from Leavenworth, Kansas.

The Honorable Homer Davis again appeared with the same requests as before, to dismiss, and the additional request of res adjudicata. During the time the relator had subjoenaed the respondents, Robert Hudspeth and Arthur Hoffman to appear to give testimony for deposition, who failing to appear, relator had asked for a default judgment against these respondents.

The court heard all matters except res adjudicata and pondered. Then the learned counsel for the respondents raised the question of res judicata, and insisted that all matters had been determined. Here was the learned counsel for the respondents pretending to be specially appearing, and insisting that the court did not have jurisdiction, suddenly bringing to the court the matter of res judicata, which words in themselves, in Latin and in English, mean to adjudicate. In other words the learned counsel for the respondents was asking in one breath, a judge to act as a court and say that he was not a court by only a judge.

To the relator at no time was it Judge Wendorff, but always the District Court of Leavenworth County, Kansas; to the respondents it may have formerly been

Judge Wendorff until they pleaded and brought to the court's attention res judicata and pressed for an opinion, to them then Judge Wendorff was no more, it was the District Court of Leavenworth County, Kansas; to the District Court of Leavenworth County Kansas, it may have been Judge Wendorff but when at the time his mouth was opened to respond to the learned counsel of the respondents Judge Wendorff had passed from the case, as the response was that of the Leavenworth County District Court. Res judicata cannot be passed on by a judge, it must be passed on by a court. At the time the court spoke, the judge was seated on the bench in the Leavenworth County court house, District courtroom, the place provided by the people of Leavenworth County for District Court to be held, the clerk was present, the sheriff within call, the relator seated at the table opposite where the learned counsel for the respondents stood at the time he threw off his questioning the jurisdiction, and appealed for res judicata, a judicial, and not a ministerial question.

The court erred in holding that he did not have jurisdiction for the learned counsel for the respondents stopped his doubt, and made the court take jurisdiction, for the question was service of process out of the State of Kansas on the Fort Leavenworth Reservation.

It was now not material whether there had been service at all, for the learned counsel for the respondents had appeared, and prayed the court to act in response to relator's petition.

In a special appearance it is the client that appears specially and not the attorney. The learned counsel for the respondents was a member in good

standing at the Bar of the Leavenworth County District Court, his act was such to be within the discretion of an attorney, so he waived the special appearance of his clients and asked for res judicata which is contrary to the theory of special appearance, for the one who asks for res judicata has had to waive his question of jurisdiction of the court. To do otherwise would place the pleader in the same position as the infidel who prays to the God that to him cannot exist.

The judge can act only on things of a ministerial nature, he cannot pass on judicial matters. Kansas provides what the judge can pass on in chambers or wherever he may be found. The learned counsel for the respondents would not have gone to the judge in chambers neither would the judge have passed on res judicata in chambers, but the matter was passed on by the Leavenworth County District Court, as he had jurisdiction of the subject-matter and the court could grant the relief prayed for, the relator was present, and had given his jurisdiction when the petition was filed, the respondents, even if the service was not good, had appeared and required the court to act on res judicata.

The Fort Leavenworth Reservation is either a part of Kansas or it is not a part of Kansas. Suppose for argument's sake it is not a part of Kansas, then the Kansas Legislature would have no more jurisdiction over it than it would over the District of Columbia. The courts of Kansas would have no jurisdiction there. Since it is not a part of the State of Kansas the United States District Court nor the Circuit Court of Appeals would have no jurisdiction as Congress has never put the Fort Leavenworth Reser-

vation in any district. The only court that could possibly have jurisdiction is the United States Supreme Court, for it is the only court that follows the flag, and the flag would seem to be all the connection between Fort Leavenworth Reservation and the United States.

Amendment XIV of the United States Constitution provides that all persons that are citizens of the United States are citizens of some state. Respondent, Shuttleworth, may be a citizen of Minnesota and reside on the Fort Leavenworth Reservation; respondent Hoffman may be a citizen of New York, and reside there; but if respondent Hudspeth is not a citizen of Kansas, could he be a citizen of the United States for it does not appear that he is a citizen of any other state?

On the other hand the United States Supreme Court, in Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 542, 29 L. ed 270, seems to hold that the Fort Leavenworth Reservation is a part of the State of Kansas.

The court may perhaps take judicial notice of how affairs are carried on on the reservation. If a female were taken from Atchison to Leavenworth by highway or by the Missouri Pacific Railroad to Leavenworth for immoral purposes would the party be liable to be charged under the Mann Act; if a car was stolen and carried across the reservation would the Dyer Act apply? A crime is committed in Leavenworth and the criminal crosses Metropolitan Avenue and is found on the sidewalk on the reservation side, to whom would the governor of Kansas apply for extradition if it was necessary? Does not the Legislature of Kansas legislate for the Leavenworth Reservation?

Since the Legislature of Kansas legislates for the Leavenworth Reservation is not the reservation a part of Kansas? If it is a part of Kansas it must be a part of some county, and that county seems to be Leavenworth County.

The Kansas Legislature does not seem to have ever provided for a special court for the Leavenworth Reservation, the Kansas Constitution makes the District Courts courts of general jurisdiction, and until some other court is provided that court must act.

It would be impossible for a court to function whose process could not be enforced, so but one conclusion could be logically drawn, and that is that the process of the Leavenworth County District Court would be good on the Fort Leavenworth Reservation the same as anywhere else in Leavenworth County.

Respectfully submitted,

Arthur S. Humes,

Relator.

ADDITIONAL ARGUMENT

Since rule No. 10 Kansas Supreme Court Rules in regard to motion and notice as pertaining to this subject matter is: "No. 10. In writing—Notice. Orders for settling disagreements concerning abstracts, or for reviewing, continuing, or advancing or dismissing causes, or retaxing costs, will be made only upon written motions stating fully and specifically the grounds therefor, and at least ten days' notice of the time of hearing thereof must be served on the opposing counsel, together with a copy of the motion. Such motions, together with proof of service of notice, must be filed with the clerk three days before time fixed for submission."

As plaintiff had no notice that any matter would be taken up on November 16, 1942, or any other day except December 9, 1942, and receiving the following reply from the United States District Attorney's office in a request to Honorable George West; Post Office Building Topeka, Kansas, asking if, since it was short that the whole record should be printed replied with the following:

Department of Justice
UNITED STATES ATTORNEY
District of Kansas
Topeka, Kansas
November 24, 1942

Mr. Arthur S. Humes
Benton, Missouri
Dear Sir:

Your letter of November 20, 1942, with reference to case No. 35,735 recently pending in the Supreme Court of Kansas, is acknowledged.

In reply wish to advise that we regard this matter as now closed.

Very truly yours,
EUGENE W. DAVIS
Eugene W. Davis
Assistant U. S. Attorney

EWD:jp

With the record being very brief on Nov. 16th in the Kansas Supreme Court what happened there that day can be guessed at as well by the court as by the relator.

ARTHUR S. HUMES,
Relator.